82-6210

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. A-589

JIMMIE LEE BURDEN, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether in a capital case the trial judge's failure to affirmatively and explicitly advise the petitioner that he personally had a right to address the jurors on his own behalf and to make any statement in mitigation of punishment before the jury commenced the sentencing phase of the case, violated petitioner's Eighth and Fourteenth Amendment rights.

2. Whether in a capital case the trial judge's failure to properly answer the jury's inquiry regarding the effect of a life sentence denied petitioner's right to have a jury properly instructed, and violated his Sixth, Eighth and Fourteenth Amendment rights.

3. Whether in a capital case the Fifth, Eighth and Fourteenth Amendments to the Constitution forbid the presentation of "other crimes" evidence except under circumstances where the defendant has previous and sufficient notice of the anticipated evidence; the quality of the evidence meets an appropriate threshold standard of reliability; and there is a sufficient link between the evidence and the crime charged in the indictment.

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TO THE SUPREME COURT OF GEORGIA

Petitioner Jimmie Lee Burden, Jr. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia, Burden v. State of Georgia, 297 S.E.2d 242 (1982) is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on November 16, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides in relevant part:

> No person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a Grand Jury . . .

the Eighth Amendment, which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted.

and the Fourteenth Amendment, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Petitioner, Jimmie Lee Burden, Jr., was tried, convicted and sentenced to death by a jury in the Superior Court of Washington County, Georgia, for the murders of Louise Wynn and her three children. The Georgia Supreme Court affirmed the convictions and sentences. Burden v. State of Georgia, 297 S.E.2d 242 (1982). Petitioner now seeks a writ of certiorari from this Court to the Supreme Court of Georgia to review that court's affirmance of his conviction and sentence.

This is not the typical death penalty case which comes before this Court, for the evidence - such as it was - was extremely tenuous and unreliable. Petitioner was charged with the murders eight years after they occurred, and after the State had lost or destroyed significant evidence (Tr. 438; 531). No direct evidence - save that of a fully

immunized and inherently unreliable informant who himself was initially charged with the crime - was presented to the jury. There have been no confessions or incriminating statements by the petitioner. Nor was there any physical evidence linking petitioner to the deaths or even to the scene. Because the evidence is so circumstantial and of such dubious value, it is necessary to briefly outline the essence of what was produced at trial. This evidentiary context underscores the serious nature of the constitutional issues raised in this petition for certiorari.

On the evening of August 15 and the morning of August 16, 1974, four bodies were recovered from Smith's Pond, in Washington County, Georgia.[1/] An extensive investigation was conducted by the Georgia Bureau of Investigation, the Federal Bureau of Investigation and local authorities. During the initial stages of the investigation, everyone associated with the decedent, Louise Wynn, was questioned extensively (Tr. 449). The petitioner's name was never raised as a suspect or even as an acquaintance of Louise Wynn (Tr. 450). Petitioner had been born in Washington County, Georgia, lived there most of his life and was living there at the time of the deaths and the investigation.

From the time of the murders until 1981 - almost eight years - petitioner's name never entered into the case (Tr. 450). In late 1981, an individual named Henry "Acid" Dixon was arrested and charged with the murders of Louise

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1/ They were identified as Louise Wynn and her three children. Autopsies revealed that Louise Wynn died from multiple blows to the head or drowning (Tr. 524). All the children died from drowning. One child allegedly had marks on her head, but it was not established that there was any strangulation (Tr. 528).

Wynn and her three children (Tr. 669, 685). Several weeks after the arrest, Dixon made statements implicating his uncle, the petitioner, in these crimes. After structuring an agreement with Dixon, the State dismissed the charges against Dixon and gave him immunity from prosecution. As part of this deal, he agreed to testify against petitioner (Tr. 674, 685).

At the trial, the State's primary evidence was the testimony of Acid Dixon, who claimed that he drove the petitioner, Louise Wynn and her three children to Smith's Pond on the day of the murders. (Tr. 635-39). Petitioner, he testified, had been drinking. Two hours after leaving his uncle and the victims at the pond, he returned to find petitioner walking by himself along the road (Tr. 639-41). Petitioner got in the automobile, and Dixon asked "where was Louise?" (Tr. 640). According to Dixon, "he [petitioner] said Louise Wynn did not act right and he hit her on the side of the head with something." (Tr. 641).

On cross examination, Dixon admitted that he initially had been charged with the murder of Louise Wynn and other crimes; and that he had been granted immunity (Tr. 649, 685). He also acknowledged that he had been incarcerated as a "material witness" in the case for over five months (Tr. 647). He claimed he had not gone to the investigators with his information because he was afraid of petitioner (Tr. 642). But that after eight years he told the police "because I ain't feel like just keeping it to myself." (Tr. 686).

Other than the Dixon testimony, the most significant part of the State's presentation consisted of the testimony of two women who claimed they were assaulted by the

petitioner almost six years after the murders. The State claimed that this testimony was admissible under the Georgia statute that allowed for the presentation of "other crimes" evidence. The State, over objection, argued that this testimony would be probative of the petitioner's propensity to assault women and therefore would circumstantially prove he committed the 1974 murders. There was no corroboration between the alleged incidents. The "other crimes" were unrelated to the indicted charges, in terms of such factors as motive, modus operandi, identification, or any of the other criteria employed to evaluate other crimes evidence. It was simply a matter of threatening conduct occurring and the alleged victims being women.

Following argument, the jury deliberated over a two day period before returning a verdict of guilty of four counts of murder in the first degree (Tr. 977). There then followed the sentencing phase of the case. Petitioner's counsel offered no evidence whatever in mitigation. Petitioner was not told that he could address the jury, and did not do so. His attorney made a statement that covered approximately seven pages of the transcript (Tr. 1008-1015; the full argument is appended to this petition as Appendix B.) Defense counsel's argument wholly ignored petitioner's personal circumstances, and dealt mostly with the concept of the death penalty itself. For example, he stated:

> Richard Speck did not go to the electric chair. They have not killed Richard Speck. The State of Georgia did not seek to kill Wayne Williams. Charles Manson wasn't killed in the electric chair.

(Tr. 1012). Thus, the jury received no information whatever about the petitioner, and he never had an opportunity to personally address the jurors on the issue of whether he should live.

After the jurors had been instructed on the death penalty, they commenced deliberations. They then returned with a question for the court. The following colloquy ensued:

> BY THE COURT: Yes, sir, I understand you have a question.
>
> BY THE FOREMAN: Yes, sir, Your Honor. If we fix sentence as life imprisonment on each of the counts, does that mean that the four sentences of life imprisonment will be served consecutively?
>
> BY THE COURT: That is a matter that you would not be concerned with. Your determination is to fix the sentence and then any other consideration that may be given to that would not be within your jurisdiction.
>
> BY THE FOREMAN: That's for the Court to decide.
>
> BY THE COURT: Well, that's the assumption on your part, but it's not something for you to decide and concern yourself with.
>
> . . . .

(Tr. 1027-28).

The jury resumed its deliberation and returned with its decision that the death penalty be imposed (Tr. 1032).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner's counsel objected during the trial to the admission into evidence of "other crimes" evidence. He stated "This has brought into play another crime for which he is not charged in the case." (Tr. 692). A mistrial was requested (Tr. 692). On appeal, the Georgia Supreme Court ruled that the evidence had properly been admitted. Burden v. State of Georgia, supra, 297 S.E.2d at 244.

2. During the sentencing phase, the jurors asked whether four life sentences would be served consecutively (Tr. 1027). The court told them that the matter was "not something for you to decide or concern yourself with." (Tr. 1028). Petitioner's counsel objected to this and asked that

the jury be given greater clarification (Tr. 1030). The court would not do so. This issue was not presented to the Georgia Supreme Court. However, that court, on its own motion, "reviewed the entire record for errors." Thus, the matter is ripe for review by this Court.

3. The issue of whether petitioner had a constitutional right to be advised that he personally could address the jurors at the sentencing phase was not raised by petitioner before the Georgia Supreme Court. However, that court, on its own motion, "reviewed the entire record" for errors. Thus, the matter is ripe for review by this Court.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL JUDGE'S FAILURE IN A DEATH PENALTY CASE TO AFFIRMATIVELY AND EXPLICITLY ADVISE THE DEFENDANT THAT HE PERSONALLY HAD A RIGHT TO ADDRESS THE JURORS ON HIS OWN BEHALF AND TO MAKE ANY STATEMENT IN MITIGATION OF PUNISHMENT BEFORE THE JURY COMMENCED THE SENTENCING PHASE OF THE CASE, VIOLATED PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

The facts of this case present with great clarity an important question not previously decided by this Court: whether in a death penalty case a criminal defendant must in explicit and unequivocal terms be told that he has the right to personally address the jurors on his own behalf and to personally make any statement in mitigation of punishment, prior to the commencement of the deliberations on the death penalty phase of the case.

Petitioner had a constitutional right as a matter of procedural due process to be heard by the jury on the issue

of punishment. Yet to assert that right he needed to be advised of the right. Nothing could be more fundamental than telling a criminal defendant that he has an opportunity to personally speak to the jury and express to them his thoughts on the death penalty. Few statements can be more profound and affecting than a convicted man standing before a death penalty jury and saying: "I do not want to die; please do not take my life; I beg you for mercy." Yet in this case, a jury decided that Jimmie Lee Burden would die without ever hearing a word from his lips, as to whether he cared to live.

In Townsend v. Burke, 334 U.S. 736, 741 (1948), the Court emphasized how the due process right to be heard through counsel at sentencing is crucial to avoid sentencing "on a foundation so extensively and materially false. . . ." In capital cases, the Court has repeatedly explained the right of a defendant to have the jury consider in mitigation "any aspect of a defendant's character or record . . . that the defendant proffers as a basis of a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978). But the right to be heard is broader than simply having counsel speak; it includes the right to speak for oneself - especially when the issue is life or death. As Justice Frankfurter has explained:

> . . . We are not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century - the sharp decrease in the number of crimes that are punishable by death, the right of the defendant to testify on his own behalf, and the right to counsel. But we see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for

> the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.

Green v. United States, 365 U.S. 301, 304 (1961) (emphasis added). A defendant on the verge of receiving the death sentence confronts the gravest situation the law can present. "At least, then, the right of allocution becomes a constitutional right - the right to speak to the issues touching on sentencing before one's fate is sealed." McGautha v. California, 402 U.S. 183, 238 (1971) (separate opinion of Justice Black).

In the federal system, the right to be heard at sentencing, i.e., allocution, is explicitly guaranteed by Rule 32(a) of the Federal Rules of Criminal Procedure. In the spirit of this rule, the Georgia trial judge before imposing sentence asked the petitioner if he had anything to say (Tr. 1056). Yet this process was a meaningless ritual inasmuch as the jury had already decided the petitioner's fate. It the right to be heard is to be meaningful, it must accrue before the jury deliberates.

Rule 32(a), with its directive that the defendant be told of his right to speak to the sentencing authority, embodies the practice of the English-speaking world for over three centuries. "As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal." Green v. United States, supra, 364 U.S. at 304. Yet, here Mr. Burden was never asked if he had anything to say; and the jury never heard from his lips the statement that he did not want to die. Such a statement might well have changed

the jury's decision. Without any meaningful statement by his lawyer, and without hearing from the defendant himself, the jury nonetheless was giving quite serious consideration to a sentence of life imprisonment, as evidenced by its inquiry to the trial judge regarding consecutive life sentences (Tr. 1027).

In Lockett v. Ohio, supra, 438 U.S. at 604, the Court established a constitutional requirement in capital cases that the sentencing authority consider all mitigating evidence presented by the defendant relating, inter alia, to his character and circumstances. A necessary corollary to this right is that the defendant be told that he personally can address the jury and speak on his own behalf. In Georgia, the decision of whether a defendant should live or die is left to the absolute discretion of the jury. Its verdict is final and binding on the court (Ga. Ann. Stat. 17-10-31). Thus the trial judge's inquiry: "Have you anything to say before sentence is pronounced by the court?" (Tr. 1056) was a mere formality, devoid of substance, because it came after the sentence had been determined. It was an error of constitutional dimension[2/] to fail to

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2/ In McGautha v. California, supra, the Court found no denial of procedural due process in a death penalty case where the defendant claimed the unitary trial system prevented him from addressing the jury on matters of mitigation. Justice Harlan explained that the defendant was not denied his opportunity to speak in mitigation. The issue presented here was not decided. As Justice Harlan explained, "This Court has not directly determined whether or to what extent the concept of due process of law requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so." 402 U.S. at 218 (footnote omitted). It is important to stress that the issue here is not a broad-based inquiry of a defendant's rights at sentencing, but only in the unique situation of a death penalty case when the jury is the final authority on the matter of punishment.

advise the defendant that he had a right to speak to the jury before they determined whether he should be sentenced to death.

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S FAILURE TO PROPERLY ANSWER THE JURY'S INQUIRY REGARDING THE EFFECT OF A LIFE SENTENCE DENIED PETITIONER'S RIGHT TO HAVE A JURY PROPERLY INSTRUCTED, AND VIOLATED HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

In all criminal cases a trial judge must instruct the jury with extreme care and precision. Cooper v. United States, 357 F.2d 274 (D.C. Cir. 1966). See also ABA Standards for Criminal Justice, Trial by Jury § 3.6. This requirement takes on even greater significance when the instruction relates to the death penalty. Vague and indefinite statements that could mislead the jury run afoul of the due process clause. This Court has repeatedly explained the capital sentencing procedure must "channel the sentencer's discretion by 'clear and objective' standards." Gregg v. Florida, 428 U.S. 153, 198 (1976) that provide "specific and detailed guidance." Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

Here, after the jurors had commenced deliberations, they sought clarification on a matter they deemed important. Thus the following:

> BY THE COURT: Yes, sir, I understand you have a question.
>
> BY THE FOREMAN: Yes, sir, Your Honor. If we fix sentence as life imprisonment on each one of the counts, does that mean that the four sentences of life imprisonment will be served consecutively?
>
> BY THE COURT: That is a matter that you would not be concerned with. Your determination is to fix the sentence and then any other consideration that may be given to that would not be within your jurisdiction.

BY THE FOREMAN: That's for the Court to decide.

BY THE COURT: Well, that's the assumption on your part, but it's not something for you to decide and concern yourself with.

BY THE FOREMAN: So, we have . . .

BY THE COURT: You have no say-so . . .

BY THE FOREMAN: . . . no say-so.

BY THE COURT: And you strictly determine the sentence that is to be imposed, either the death penalty or life in each one of the cases.

BY THE FOREMAN: Thank you.

BY THE COURT: Does that answer your question?

BY THE FOREMAN: Yes, sir.

BY THE COURT: Thank you, sir. You may retire.

(Tr. 1027-28) (emphasis added).

The judge's comment to the jury failed to provide appropriate guidelines and left the jurors with an ambiguous answer which misguided their deliberations. Additionally, it was an erroneous statement of law, for a jury can weigh in its decision the consequences of a life sentence. To simply say it is "of no concern" or "that's the assumption on your part" fails to give appropriate guidance.

The circumstances here are in stark contrast to a situation that occurred in McGautha v. California, supra. There the jury confronted the trial judge with a similar question. As Justice Harlan explained:

> The penalty jury interrupted its deliberations to ask whether a sentence of life imprisonment meant that there was no possibility of parole. The trial judge responded as follows:
>
> "A sentence of life imprisonment means that the prisoner may be paroled at some time during his lifetime or that he may spend the remainder of his natural life in prison. An agency known as the Adult Authority is empowered by statute to determine if and when a prisoner is to be paroled, and under the

> statute no prisoner can be paroled unless the Adult Authority is of the opinion that the prisoner when released will assume a proper place in society and that his release is not contrary to the welfare of society. A prisoner released on parole may remain on parole for the balance of his life and if he violates the terms of the parole he may be returned to prison to serve the life sentence.
>
> "So that you will have no misunderstandings relating to a sentence of life imprisonment, you have been informed as to the general scheme of our parole system. You are now instructed, however, that the matter of parole is not to be considered by you in determining the punishment for either defendant, and you may not speculate as to if, or when, parole would or would not be granted. It is not your function to decide now whether these men will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether these men shall suffer the death penalty or whether they shall be permitted to remain alive. If upon consideration of the evidence you believe that life imprisonment is the proper sentence, you must assume that those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that they will not parole a defendant unless he can be safely released into society. It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the Adult Authority will properly carry out its responsibilities.

402 U.S. at 716-17 n.4.[3/] The difference between the two quotes highlights what a judge could have said, in order to give clarification. As it was, the jurors were left speculating about what role they had in the sentencing process; the effect of a life sentence, whether a life

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[3/] The issue raised here will probably be affected by the Court's decision in California v. Ramos, 30 Cal. 3d 553 (1982), cert. granted Oct. 4, 1982, a case in which the Court will examine the constitutionality of a California statute that requires the trial court to tell the jury that any sentence of life imprisonment is subject to executive clemency but does not require the court to instruct that a death penalty case is also subject to executive clemency. At the very least, a ruling on this issue should be deferred until the Ramos case is decided by this Court.

sentence meant parole automatically; or whether it meant no possibility of parole. In short, the jurors were left to guess and assume, at the very time when it was important that they be given explicit, precise and definite guidance by the court.[4/] A sentencing process which permits the jury to impose the death penalty on the basis of speculation is inherently unreliable and invites the arbitrary and capricious verdicts that this Court has condemned See, e.g., Godfrey v. Georgia, 446 U.S. 420, 427 (1980); Woodson v. North Carolina, supra, 428 U.S. at 305.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER IN A CAPITAL CASE THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION FORBID THE PRESENTATION OF "OTHER CRIMES" EVIDENCE EXCEPT UNDER CIRCUMSTANCES WHERE THE DEFENDANT HAS PREVIOUS AND SUFFICIENT NOTICE OF THE ANTICIPATED EVIDENCE; THE QUALITY OF THE EVIDENCE MEETS AN APPROPRIATE THRESHOLD STANDARD OF RELIABILITY; AND THERE IS A SUFFICIENT LINK BETWEEN THE EVIDENCE AND THE CRIME CHARGED IN THE INDICTMENT

Petitioner was charged with murders that occurred in 1974. The indictment made reference to no other crime, and it was only the 1974 charges for which petitioner was on notice that he must defend. At trial, however, the accusations expanded and petitioner was confronted with evidence that he had been involved in two previous situations which the government characterized as reflecting

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4/ Moreover, the judge himself seemed unclear about the import of both the question and his answer. He explained to counsel "we all know that nobody can serve a consecutive life sentence. No way in the world for a judge to impose a sentence, reasonably speaking, that when this man dies, he's going to serve another life sentence. It just can't be done. When this man dies, his sentence is over . . ." (Tr. 1030).

an "assaultive" character (Tr. 697-705). The State presented this theory under a Georgia common law rule of evidence that permits evidence of other crimes or bad acts to be admitted under particularized circumstances. In fact, these circumstances were missing and the State failed to establish any logical or reasonable link between the crime charged in the indictment and the allegations from the two witnesses. Because this matter turns on the nature of the evidence, a brief summary of the witnesses' testimony will be set forth.

Midway through its presentation of the case, the State called Willie Kate Dixon to the witness stand. She was asked if she knew the petitioner, and responded she knew him "cause he broke into my house" (Tr. 691)[5/] in May 1980 (six years after the murder).

Defense counsel moved for a mistrial, arguing that this testimony "brings into play another crime that is not charged in this case" (Tr. 692). The State responded as follows:

> The question is whether or not evidence of similar acts of sexual violence are admissible to show the identity of the defendant, motive, scheme, bent of mind when objected to on the basis of relevancy or placing of the defendant's character in issue. In the case at hand what we are trying to show is the defendant's propensity to violence and sexual assault when he is drinking.

(Tr. 693). Though defense counsel correctly noted that there was no allegation of sexual conduct regarding the murders (Tr. 695), the testimony was admitted. The trial judge

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[5/] Later in her testimony, Ms. Dixon offered a more direct reason for her knowing petitioner. She testified he was her brother (Tr. 708). However, even this point was subject to some confusion as she later noted that she "didn't know" if he was her brother (Tr. 713). On cross examination she also acknowledged that she was the mother of the initial defendant in this case - Acid Dixon. (Tr. 717).

explained he would admit the "evidence of the previous [sic] offense" (Tr. 699). This evidence, the court claimed, showed the "course of conduct of the individual." (Tr. 705). Thus Mrs. Dixon was allowed to testify.[6/] Her presentation showed no sexual assault as claimed by the prosecutor, and no similarity to the circumstances of the murder, save the fact that adult women were involved in both instances.

The State also presented testimony from Betty Jean Darrisaw, petitioner's girlfriend with whom he formerly lived. Her testimony was even more unrelated to the charges found in the indictment. She claimed that one evening[7/]

6/ The court instructed the jury that the "evidence may be introduced for the purpose of identifying the defendant as the guilty party and for the purpose of showing motive, plan, scheme, bent of mind and course of conduct (Tr. 707).

7/ The time of this occurrence is difficult to ascertain, as evidenced by the following testimony:

Mrs. Darrisaw, when did Jimmy come to your house?

A. When did he come to my house.

Q. And drug you out?

A. It was one Friday.

Q. How long ago has that been?

A. I don't know that.

Q. Has it been a year ago?

A. I reckon so.

Q. Has it been two years?

A. You can say that. I don't know.

Q. No, I'm asking you.

A. I don't know.

Q. Do you know whether it's been, how long do you think it's been? Do you know what year it happened in?

A. I say about last year.

the petitioner went to her house and was let in by her father (Tr. 718). According to Mrs. Darrisaw, petitioner then "grabbed me and pulled me out the front door and carried me across the field." (Tr. 719). On the field, "nothing happened." (Tr. 719). As she explained:

> A. He grabbed me and pulled me out the front door and carried me across the field.
>
> Q. How far across the field was it?
>
> A. Over there by the pecan tree.
>
> Q. Was that a long way from your house?
>
> A. Right.
>
> Q. What did he do when he got over there to the pecan tree?
>
> A. He throwed me down.

On appeal, the Georgia Supreme Court dealt with the issue in summary fashion, noting:

> It is the State's contention that Burden had been drinking heavily on each occasion, that he demanded the victim have sexual intercourse with him and upon being rebuffed became violent. The two transactions were sufficiently similar to show identity, motive, plan, scheme, bent of mind and course of conduct, and the trial court did not err in admitting testimony concerning them.

Burden v. State of Georgia, 297 S.E.2d at 244.[8/]

The appellate ruling is wholly at odds with the evidence at trial. If that was all that were involved, certiorari would be warranted because the inflammatory and prejudicial features of such evidence - in any criminal case - make it impossible to conclude that the jury was not improperly affected by such testmony. However, the case

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8/ In neither instance was there any indication that sexual intercourse was demanded of the alleged victims. More significantly, there is no direct evidence that the deceased Louise Wynn had been sexually assaulted.

identifies a greater problem. The issue is whether in a capital case, the government, without notice to the defendant; without meeting any reasonable standards of admissibility; and without establishing a substantial link with the crimes charged in the indictment - can present evidence of other crimes[9/] activity. This Court should examine the standards governing the use of other crimes evidence in capital cases because the wholly unreliable features of such testimony creates a substantial likelihood of unreliable verdicts.

Generally, evidence of other crimes or wrongs is inadmissible in a criminal trial. The reason for excluding this type of evidence is that it pollutes the truth finding process. Evidence is admissible only when it tends to prove a relevant fact. Evidence of another crime or wrong generally has no relationship to the crime charged and is therefore not probative of the issue of guilt or innocence. Furthermore, extreme prejudice results:

> The natural and inevitable tendency of the tribunal whether judge or jury is to give excessive weight to the vicious record of crime exhibited . . . the use of alleged particular acts ranging over the entire period of the defendant's life make it impossible for him to be prepared to refute all the charges any and all of which may be fabrications.

Wigmore on Evidence § 194 (3d ed. 1940; emphasis added). Here, petitioner was given no notice of the charges that occurred six or seven years after the crime identified in

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9/ The phrase "other crimes" as used by the trial court and attorneys below is a misnomer. With regard to Mrs. Darrisaw's claims, he was never charged with any offense. In the federal system and elsewhere, the rule of evidence deals with "other crimes, wrongs or acts." See e.g., Rule 404(b), Federal Rules of Evidence.

the indictment. The defendant has a fundamental right to notice of the charges against which he must defend. That is denied when the State can change the course of its presentation during the middle of trial and introduce other charges.

Other crimes or wrongs evidence is prejudicial because it tends to show a propensity to commit crimes. A defendant can be convicted because the jury concludes he is a person of bad character:

> The introduction of such evidence is said to create a danger that a jury will punish the defendant for offenses other than those charged, or at least that it will convict when unsure of guilt, because it is convinced that the defendant is a bad man deserving of punishment.

Note, Procedural Protections of the Criminal Defendant: A Reevaluation of the Privilege Against Self Incrimination and the Rule Excluding Evidence of Propensity to Commit Crimes, 78 Harv. L. Rev. 426, 436 (1964); (footnote omitted). Whatever the trial court's instructions, the jury may well misuse the evidence and be affected by the defendant's "bad character." Here, the trial judge gave little guidance to the jury, and a threshold standard for admissibility was never discussed - other than the observation that it must be similar in one form or another to the crimes charged in the indictment.

Exceptions to the general exclusionary rule have been developed by common law and by statute in both federal and state courts. In the federal system, Rule 404(b) of the Federal Rules of Evidence precludes the admission of

evidence of other crimes, wrongs or acts except in very limited and well defined circumstances.[10/] States, likewise, have provided for the admissibility of evidence regarding other crimes, under specified circumstances. See, e.g., Ga. Code Annot. 38-202.

The courts however have failed to establish any meaningful standards regarding the admissibility of the evidence. As Judge Weinstein has explained:

> The question of when evidence of a particular criminal act may be admitted is so perplexing that the cases sometimes seem as numerous - as the sands of the sea - and often cannot be reconciled.
>
> . . . .
>
> Certainly, a reading of the huge volume of cases decided pursuant to Rule 404(b) - more decisions than occasioned by any other single rule - compels the conclusion that in numerous instances, particularly with regard to certain crimes, the courts recite the list of permissible ones specified in the rule and admit without any analysis of the proffered evidence.

Weinstein, Evidence, (1982) ¶ 404[8] (emphasis added).

The rules generally (and the Georgia rule specifically) do not provide that advance notice be given that other crimes will be shown at trial. Some courts have suggested that due process requires the government to notify counsel and defendant of the evidence, in advance of the trial or hearing. Cf., United States v. Pason, 561 F.2d 799, 803 (9th Cir. 1977). Here, there is no indication that

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10/ Rule 404(b) provides:

> Evidence of other crimes, wrongs or acts are not admissible to prove the character of a person or to show he acted in conformity therewith. It may, however, be admissible for other purposes, such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

defense counsel knew of the government's intentions until the evidence was presented. An opportunity to rebut was effectively denied by the failure to notify.

Assuming adequate notice, the reliability and sufficiency of the proffered evidence must meet appropriate due process standards. Otherwise the presented evidence is nothing more than an attempt to smear the defendant. In this case, the other wrongful activity was extremely remote in time and of tenuous similarity. The court engaged in no weighing of the evidence or analysis of the particulars involved. Petitioner was charged with murdering a woman and her three children. There was no allegation in the indictment of any sexual conduct. Likewise, the statements by the two "other crimes" witnesses reflected neither sexual activity nor other similar to the indicted charges - except on the most extreme reading. In the case of Ms. Darrisaw, she explicitly stated "nothing happened."

The prosecutor, in his closing argument, dealt with this subject at great length. He created similarities that the evidence did not permit, and the jury was left seeing the defendant as someone who had engaged in a course of similar conduct over a period of eight years. The possibility the jury misused this evidence is expressly found on the fact that both the prosecutor and court instructed them to so use the evidence.

This Court has not reviewed or established the appropriate standard and test for the admissibility of

evidence of other crimes or wrongs consistent with due process and fundamental fairness.[11/] However, in the context of a capital case where there is a vital need for reliable verdicts, the prosecution should be held to an explicit and reasonable standard of admissibility when it proposes to introduce such evidence. This Court should establish standards which at the very least provide for:

(a) Notice to the defendant that the government may introduce such evidence.

(b) A reasonable standard of admissibility of such evidence.

(c) A requirement that the evidence initially be presented out of the presence of the jury.

(d) A requirement that the evidence not be remote in terms of either time or relationship to the crime charged in the indictment.

Such evidence has inherently prejudicial features and violates the due process clause of the Fourteenth Amendment when it is presented in the manner found here. Moreover, its tendency to foster unreliable verdicts in capital cases offends the Eighth Amendment ban on cruel or unusual punishment. As Judge Weinstein suggests, there is a need for this Court to review the admissibility of such evidence. That need becomes even more pressing when the State has relied on "other crimes" evidence in a capital case.

11/ See, e.g., Lesenba v. California, 314 U.S. 219, 228 (1941) (review of state rule regarding the admission of confession); Spencer v. Texas, 385 U.S. 554, 560 (1967) (review of Texas statute which permitted evidence of other crimes at sentencing phase under habitual criminal statute); Michaelson v. United States, 335 U.S. 469 (1948) (admissibility of character evidence against defendant).

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that this Court should issue a writ of certiorari to the Supreme Court of Georgia to review its decision.

Respectfully submitted,

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Washington, D.C. 20036
(202) 737-7777

Robert F. Muse #166868

won't have it.

This is your opportunity. This country was built by people of courage and strength and stood up to forces of evil. This community has a history as long as any that has stood up to the forces that opposed it. It's pulled at itself and survived. It has survived the ravages of war. It has survived the ravages of many wars. It's young people went off to war on numerous occasions, both black and white, and died for their country. They died for their county, and the people of this county have exhibited the courage to tell the Japanese, to tell the Germans, to tell anybody who wanted that we will not tolerate this, and you had four people murdered in this county. Send the message. We will not tolerate mass murders in Washington County, Georgia. Let your hearts speak. Let the message be heard.

I urge you in each of the four counts presented to you to find a verdict of death by electrocution. Thank you.

BY THE COURT: Mr. Moses.

BY MR. MOSES: Thank you, Your Honor.

CLOSING STATEMENT

BY MR. MOSES:

Ladies and gentlemen of the jury, as has been discussed for four days or this is the fourth day this week, this is the sentencing phase of this trial. The job that you have at this time is

accelerated the death, although proximately occasioned by a pre-existing cause.

State v. Crane, 247 Ga. 779, 279 S.E.2d 695 (1981), urged by defendant is inapposite. In *Crane* the deceased was a burglar who was shot by the intended burglary victim. Here the defendant's actions were directed at the deceased, and the question is whether those actions (felonies) were the cause of death.

[9] It could be argued that there was a "reasonable hypothesis" that the victim died from cardiac arrest not caused by the burglary and aggravated assault. See Code § 38-109. The medical examiner testified that the cause of death was cardiac arrest caused by the victim's small coronary arteries and the stress of events before the victim's death. The jury was authorized to find the defendant guilty of felony murder beyond a reasonable doubt.

[10, 11] 6. During closing argument, the district attorney argued that defendant's explanation of how he was shot was ludicrous and against the law of physics. Defendant claimed he was walking across the street from Barfield's when he was struck in the back by a bullet moving in an upward direction. Two witnesses testified that this set of facts was physically possible. Defendant claims the district attorney's statement is against the evidence and improper. We disagree. The state was merely arguing the unlikelihood that defendant's version of the facts occurred. In closing arguments each side is permitted to make any argument which is reasonably suggested by the evidence.

[12, 13] 7. Defendant's final enumeration of error is the trial court's failure to grant his motion for a change of venue. Defendant claimed that pretrial publicity of the crime made it impossible for him to receive a fair trial. A motion for change of venue is addressed to the discretion of the trial court, and a denial of such motion will be overruled only where there is an abuse of such discretion. See *Johnson v. State*, 242 Ga. 649, 653, 250 S.E.2d 394 (1978); and *Presnell v. State*, 241 Ga. 29, 33, 243 S.E.2d 496 (1978). We have reviewed the newspaper accounts which defendant alleges required a change of venue, and we find no abuse of discretion by the trial court in not granting the motion.

Judgment affirmed.

All the Justices concur.

BURDEN

v.

The STATE.

No. 38766.

Supreme Court of Georgia.

Nov. 16, 1982.

Defendant was convicted before the Washington Superior Court, Walter C. McMillan, Jr., J., of four murders, with the jury imposing four death penalties, and defendant appealed. The Supreme Court, Weltner, J., held that: (1) evidence of defendant's involvement in aggravated assault was admissible; (2) imposition of death penalty for murders of each of three children could be supported by aggravating circumstance that each was committed during murder of the mother but reciprocal use of murders of the children could not be used to support imposition of death penalty for murder of the mother; and (3) death sentences were neither excessive nor disproportionate to penalty imposed in similar cases.

Judgment affirmed in part; reversed in part; remanded with direction.

1. Criminal Law ⇐369.2(1), 374

To admit evidence of independent crimes it must be shown that defendant was in fact the perpetrator of
dent crime and there must
similarity or connection betw
pendent crime and the offense
the proof of the former tends
latter.

2. Criminal Law ⇐369.15, 372(4)

Although other crime inv
vated assault rather than mu
curred at victim's residence ra
an isolated area, evidence of th
admissible in murder prosecuti
fendant conceded that he was t
tor and the state contended th
had been drinking heavily on e
that he demanded that the vict
ual intercourse with him and t
rebuffed he became violent; th
actions were sufficiently simil
identity, motive, plan, scheme, b
and course of conduct.

3. Criminal Law ⇐834(2)

Where, as given, charge o
tion of innocence fully covered
matter contained in the reques
charge in exact language reques
error.

4. Criminal Law ⇐1208(1)

Aggravating circumstance b
cumstantial evidence can be use
for imposing the death penalty.

5. Homicide ⇐354

Imposition of death penalty
ders of each of three children
supported by aggravating cir
that each was committed during
their mother but the doctrine o
supporting aggravating circumst
cluded reciprocal use of the murd
children as aggravating circum
support imposition of death pe
murder of the mother. Code, §
1fe).

6. Criminal Law ⇐1206(2)
Homicide ⇐354

Death sentences for murder o
who died from multiple blows to
for murders of four and two-year

APPENDIX A

was in fact the perpetrator of the independent crime and there must be sufficient similarity or connection between the independent crime and the offense charged that the proof of the former tends to prove the latter.

2. Criminal Law ⇐369.15, 371(4, 12), 372(4)

Although other crime involved aggravated assault rather than murder and occurred at victim's residence rather than in an isolated area, evidence of the assault was admissible in murder prosecution where defendant conceded that he was the perpetrator and the state contended that defendant had been drinking heavily on each occasion, that he demanded that the victim have sexual intercourse with him and that on being rebuffed he became violent; the two transactions were sufficiently similar to show identity, motive, plan, scheme, bent of mind and course of conduct.

3. Criminal Law ⇐834(2)

Where, as given, charge on presumption of innocence fully covered the subject matter contained in the request, failure to charge in exact language requested was not error.

4. Criminal Law ⇐1208(1)

Aggravating circumstance based on circumstantial evidence can be used as a basis for imposing the death penalty.

5. Homicide ⇐354

Imposition of death penalty for murders of each of three children could be supported by aggravating circumstance that each was committed during murder of their mother but the doctrine of mutually supporting aggravating circumstances precluded reciprocal use of the murders of the children as aggravating circumstances to support imposition of death penalty for murder of the mother. Code, § 27-2534.1(c).

6. Criminal Law ⇐1206(2)
Homicide ⇐354

Death sentences for murder of mother, who died from multiple blows to the head, for murders of four and two-year-old sons, who died from drowning, and for murder of three-year-old daughter, who died from strangulation, were neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Michael J. Moses, Louisville, for Jimmy Burden, Jr.

H. Reginald Thompson, Dist. Atty., Richard A. Malone, William McClain, Asst. Dist. Attys., Swainsboro, Michael J. Bowers, Atty. Gen., for the State.

WELTNER, Justice.

This is a death penalty case involving four murders. On the evening of August 15 and morning of August 16, 1974, four bodies were recovered from Smith's Pond in Washington County, identified as Louise Wynn and her three children, ages 2, 3 and 4. The autopsies revealed that Louise Wynn died from multiple blows to the head; that Marvin, age 4, and James, age 2, died from drowning; and that Melinda, age 3, died from strangulation. Louise was clothed only in an undergarment and a dress torn in half. The crime scene revealed an area of disturbed pine straw, possibly evidencing a struggle. Investigators also discovered there an automobile lug wrench with what appeared to be blood stains.

After extensive investigation, law enforcement officials were unable to fix upon a suspect, and the case was placed in the unsolved file some two years later. In late 1981, Henry Lee Dixon, a nephew of Burden, came forward with information leading to the arrest and indictment of this defendant.

Burden was found guilty on all four counts of a murder indictment. The jury then imposed four death penalties, finding that each murder was committed while in the commission of another capital felony, specifically, another of the murders.

1. Burden contends in enumerations of error 1, 2, 3 and 4 that the evidence was

insufficient to support the verdicts of guilty as to each count.

Henry Lee Dixon testified that on August 13, 1974, Burden came to his house and asked to ride to town with him. He then directed Dixon to a liquor store where Burden purchased a case of beer and some liquor. Burden next directed Dixon to drive to Louise Wynn's house. Burden, who had been drinking heavily all the while, went into the house, and after about 15 minutes returned with two older children, followed by Louise Wynn, who was carrying a baby. Burden told Dixon to drive, while he continued to drink, kissing and hugging Louise Wynn in the back seat. Dixon was then directed to stop along a dirt road leading to Smith's Pond, where Burden and the four victims got out of the car. Burden took from his car a shotgun, fishing poles and bait, and told Dixon to return later to pick them up. When Dixon returned he saw Burden walking down the road, he stopped and asked where the others were. Burden first said that Louise became angry and had gone to her mother's house. After Dixon wanted to go and get Louise Wynn, Burden said "he had [messed] up," that she "didn't act right" and he "hit her side the head with something" and that "she fell in the pond or he throwed her in the pond one." Dixon then asked about the children, and Burden replied, "I reckon I damn well know where they are at, too." When Dixon suggested going back to the pond, Burden threatened him with a shotgun if he ever related the event to anyone.

The day after the bodies were discovered, Burden broke a pool cue over Dixon's head when he saw him talking with others, and again warned him not to mention the events of Tuesday.

Several witnesses testified that Burden and Louise Wynn were keeping social company with each other, having seen them together at various places just prior to Louise Wynn's death.

Two other witnesses testified as to physical assaults and attempted sexual assaults made upon them by Burden at times when he had been drinking. One such witness attributed to Burden the threat: "[H]e told me that he was going to throw me in a pond like he did somebody else."

This evidence was sufficient to convince any rational trier of fact beyond a reasonable doubt that the defendant was guilty of the offenses charged. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We find no merit in these enumerations of error.

2. In enumerations of error 4 and 5 Burden contends that the trial court erred in admitting testimony of other crimes over objection.

[1, 2] In *French v. State*, 237 Ga. 620(3), 229 S.E.2d 410 (1976), two conditions were set out for the admission of independent crimes: First, there must be evidence that the defendant was in fact the perpetrator of the independent crime. Second, there must be sufficient similarity or connection between the independent crime and the offense charged, that proof of the former tends to prove the latter.

Burden concedes the first condition, but contends that because the events involved aggravated assault rather than murder and occurred at the victim's residence rather than in an isolated area, they were not similar transactions.

It is the State's contention that Burden had been drinking heavily on each occasion, that he demanded the victims have sexual intercourse with him, and upon being rebuffed, became violent. The two transactions were sufficiently similar to show identity, motive, plan, scheme, bent of mind and course of conduct, and the trial court did not err in admitting testimony concerning them. *State v. Johnson*, 246 Ga. 654(1), 272 S.E.2d 321 (1980).

3. Enumeration of error 7 contends the trial court erred in its charge on the presumption of innocence, and in refusing to give Burden's written request.

[3] The charge as given fully covered the subject matter contained in the request, and the failure to charge in the exact language requested was not error. *McClendon*

v. State, 231 Ga. 47, 199 S.E
Mason v. State, 236 Ga. 46(
339 (1976); *Nelson v. State*, 2
274 S.E.2d 317 (1981).

[4] 4. Burden contends
enumeration of error that t
erred in failing to give his re
that an aggravating circun
upon circumstantial evidenc
used as a basis for imposing t
alty. Such is not the law, and
error in failing to give the
Douthit v. State, 239 Ga. 81(
493 (1977); *Blake v. State*, 2
236 S.E.2d 637 (1977) and *Ne*
247 Ga. 172(15), 274 S.E.2d 31

5. This case was tried unde
Unified Appeal Procedure. E
ed in the sentence review, in
from our review of the enti
matters to be addressed othe
enumerated as error by the d

SENTENCE REVIE

The jury recommended the
death for each of the four m
aggravating circumstances fo
jury in support thereof may be
as follows: The murders of th
dren occurred while the defen
gaged in the commission of an
felony, the murder of Louise
murder of Louise Wynn occurr
defendant was engaged in the
of other capital felonies, the m
three children.

[5] 6. The imposition of th
alty for each of the murders
children may be supported by t
ing circumstance that each wa
during the murder of Louise Wy
land v. State, 247 Ga. 219(23), 2
(1981); *Peek v. State*, 239 Ga. 4
S.E.2d 12 (1977). But, in these c
es, the doctrine of "mutually
aggravating circumstances" prec
rocal use of the murders of the
dren as aggravating circumstan
port the imposition of the death
the murder of Louise Wynn.

v. *State*, 231 Ga. 47, 199 S.E.2d 904 (1973); *Mason v. State*, 236 Ga. 46(5), 222 S.E.2d 339 (1976); *Nelson v. State*, 247 Ga. 172(12), 274 S.E.2d 317 (1981).

[4] 4. Burden contends in his eighth enumeration of error that the trial court erred in failing to give his requested charge that an aggravating circumstance based upon circumstantial evidence cannot be used as a basis for imposing the death penalty. Such is not the law, and there was no error in failing to give the request. See *Douthit v. State*, 239 Ga. 81(6), 235 S.E.2d 493 (1977); *Blake v. State*, 239 Ga. 292(2), 236 S.E.2d 637 (1977) and *Nelson v. State*, 247 Ga. 172(15), 274 S.E.2d 317, supra.

5. This case was tried under the Georgia Unified Appeal Procedure. Except as noted in the sentence review, infra, we find, from our review of the entire record, no matters to be addressed other than those enumerated as error by the defendant.

SENTENCE REVIEW

The jury recommended the sentence of death for each of the four murders. The aggravating circumstances found by the jury in support thereof may be summarized as follows: The murders of the three children occurred while the defendant was engaged in the commission of another capital felony, the murder of Louise Wynn; the murder of Louise Wynn occurred while the defendant was engaged in the commission of other capital felonies, the murders of the three children.

[5] 6. The imposition of the death penalty for each of the murders of the three children may be supported by the aggravating circumstance that each was committed during the murder of Louise Wynn. *Strickland v. State*, 247 Ga. 219(23), 275 S.E.2d 29 (1981); *Peek v. State*, 239 Ga. 422, 429, 238 S.E.2d 12 (1977). But, in these circumstances, the doctrine of "mutually supporting aggravating circumstances" precludes reciprocal use of the murders of the three children as aggravating circumstances to support the imposition of the death penalty for the murder of Louise Wynn. *Waters v. State*, 248 Ga. 355, 369(12), 283 S.E.2d 238 (1981); *Godfrey v. State*, 248 Ga. 616, 624–25, 284 S.E.2d 422 (1981). The death penalty for the murder of Louise Wynn therefore is set aside, and the case remanded for resentencing.

7. The evidence supports the jury's finding that the murders of the three children were committed while the defendant was engaged in the commission of the murder of Louise Wynn. Code Ann. § 27-2534.1(c); *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

8. We conclude that the sentences of death for the murders of Marvin Wynn, James Wynn and Melinda Wynn were not imposed under the influence of passion, prejudice, or other arbitrary factor.

[6] 9. The similar cases listed in the Appendix warrant the upholding of the death penalty in this case. Our review shows that juries generally find that the death penalty is an appropriate punishment where an adult is found to have been the actual perpetrator of or active participant in multiple murders committed upon victims who are unrelated to the murderer. Here, the evidence showed that Burden killed *four* people, three being very young children.

We note, also, that in no case appealed to this Court since January 1, 1970, has a defendant convicted in one case of murdering more than three victims received less than a death sentence. We conclude that the sentences of death in this case are neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed in part; reversed in part; remanded with direction.

All the Justices concur, except BELL, J., not participating.

APPENDIX

Pass v. State, 227 Ga. 730, 182 S.E.2d 779 (1971); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974); *Floyd v. State*, 233 Ga. 230, 210 S.E.2d 810 (1974); *Chenault v.*

APPENDIX—Continued

State, 234 Ga. 216, 215 S.E.2d 223 (1975); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248 (1976); *Coleman v. State*, 237 Ga. 84, 226 S.E.2d 911 (1976); *Young v. State*, 239 Ga. 53, 236 S.E.2d 1 (1977); *Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977); *Westbrook v. State*, 242 Ga. 151, 249 S.E.2d 524 (1978); *Finney v. State*, 242 Ga. 582, 250 S.E.2d 388 (1978); *Holton v. State*, 243 Ga. 312, 253 S.E.2d 736 (1979); *Waters v. State*, 248 Ga. 355, 283 S.E.2d 238 (1981); *Mathis v. State*, 249 Ga. 454, 291 S.E.2d 489 (1982); *Rivers v. State*, — Ga. —, — S.E.2d — (Case No. 38593, decided November 10, 1982); *Rivers v. State*, — Ga. —, — S.E.2d — (Case No. 38736, decided November 10, 1982).

DAILY

v.

DOMBROSKI.

No. 39129.

Supreme Court of Georgia.

Nov. 16, 1982.

Mother filed proceedings to hold noncustodial father, an Ohio resident, in contempt for breach of visitation provisions of Georgia child custody decree. The Superior Court, Richmond County, Bernard J. Mulherin, Sr., J., rendered judgment, from which appeal was taken. The Supreme Court, Weltner, J., held that Uniform Child Custody Jurisdiction Act did not destroy jurisdiction solely because Ohio court had previously accepted jurisdiction and that it was immaterial that mother might have sought enforcement of the Georgia decree in the pending Ohio proceedings.

Affirmed.

1. Infants ⇐18

Uniform Child Custody Jurisdiction Act did not destroy jurisdiction of Georgia court to hear contempt proceedings filed by a Georgia-resident, noncustodial mother against an Ohio-resident, custodial father for his breach of visitation provisions of a Georgia court's child custody decree solely because an Ohio court had accepted jurisdiction of visitation modification proceedings filed by the father, although had Ohio court entered a modification order before the Georgia contempt proceedings were filed the rule would be otherwise. Code, § 74-501 et seq.

2. Infants ⇐18

Purpose of Uniform Child Custody Jurisdiction Act is to avoid conflicting modification orders. Code, § 74-501 et seq.

3. Infants ⇐18

For purpose of jurisdiction of Georgia court to hear mother's contempt proceedings against custodial father for breach of visitation provisions of Georgia custody decree it was immaterial that mother might have sought enforcement of the Georgia decree in father's Ohio proceedings to modify visitation. Code, § 74-501 et seq.

William J. Sussman, Augusta, for Sue Daily Dombriski.

Victor Hawk, Leiden & Hawk, Augusta, for Michael Daily.

WELTNER, Justice.

[1-3] The Uniform Child Custody Jurisdiction Act (Ga.Code Ch. 74-5) does not destroy the jurisdiction of a Georgia court to hear contempt proceedings filed by a Georgia-resident, non-custodial mother against an Ohio-resident, custodial father for his breach of the visitation provisions of the Georgia court's child custody decree solely because an Ohio court previously has accepted jurisdiction of visitation modification proceedings filed by father. Had the Ohio court entered an order modifying the visitation provisions of the Georgia court's decree before the Georgia contempt proceedings were filed, the r
would be otherwise. See, *R*
243 Ga. 696, 256 S.E.2d 375

This rule is consistent v
policy underlying the Act,
recent decision of *Steele v.*
101, 296 S.E.2d 570 (1982).
the Act is to avoid conflicti
orders, as in *Steele*, whereas
involves enforcement by a c
unmodified custody order.

It is immaterial that the
have sought enforcement
decree in the pending Oh

Judgment affirmed.

All the Justices concur.

BURKE

v.

The STATE.

No. 39083.

Supreme Court of

Nov. 16, 198

Defendant was convict
nam County Superior Co
Thompson, J., for the murd
band by shooting him with
fendant appealed. The S
Weltner, J., held that in vi
testimony that she intended
en her husband, testimony
several months previously sh
with pistol, merely wound
properly admitted to show
mind, specifically intention
ously wound her husband,
such evidence for such pu
objectionable though it mig
tally place her character in

Affirmed.

to decide whether or not Jimmy Burden is to be given life in prison or die by electrocution; whether or not the State is going to legally kill Jimmy. That's the question at this time. As I said to begin with in my opening statement on Tuesday, there is not one single, solitary thing that can be done in this Courtroom to bring Louise Wynn, Melinda Wynn, James Wynn, and Marvin Wynn back to life. And I stand here and I tell you right now, if God could breathe breath back into those three children and that young woman, I would be the first one to say kill that man. I would say that, but killing Jimmy Burden in the electric chair is not going to breathe breath back into any single person.

Now, I know Mr. Malone gave a very eloquent speech, gave the red, white and blue and a lot of things in it. I agree with him, that whoever committed this crime should be punished and punished severely, but I don't believe that Jimmy Burden ought to die in the electric chair. Ya'll have made your decision, that the State of Georgia has proved to each and every one of you, and that they have proved it beyond a reasonable doubt that Jimmy Burden killed Louise Wynn and her three children. I don't agree with that verdict, but I respect it. Ya'll made it and ya'll have got to live with it. It doesn't mean that I have to agree, but I do respect your decision in it.

Mr. Malone went back over the evidence about the children dying and all. That's an emotional thing, but what is the evidence? They are asking you to put the man in the electric chair on the

evidence of a man, of the testimony of an individual who was granted immunity for this crime. One word against another. Acid Dixon, Henry Lee Dixon, they are asking you to take his testimony; it is the only testimony that says that this is what happened. That is how it happened and he was granted immunity and as the Judge told you yesterday, and Mr. Holmes,you requested immediately a repeat of the charge. That testimony had to be scanned with great care, great care. Now, we are to this stage where they are asking you, that they have proved enough in aggravation and proved this crime to kill Jimmy Burden on the testimony of Henry Lee Dixon.

You know, the newspapers sometimes sensationalize crimes and how some crime was committed, the guy walks free or he's eligible for parole and whatever. Well, believe me, if Jimmy Burden is sentenced to life in prison on each one of these counts, that he will spend a great number of years in the penitentiary of this State. A great number of years. Probably, never be eligible for parole. You know, I like to reflect on some of the other crimes that have been committed in the State and country where the death penalty was not imposed. One of them that was very sensational was Charles Manson. He did not die in the electric chair and I believe there has been some fourteen, maybe fifteen years ago. Richard Speck killed eight people brutally, nurses, young women, and he did not go to the death chair. One more recent to home, no, what is a death case? What is it? Wayne Williams, one right here in Georgia, mass murderer; that was not a death penalty case. So, all these

things have to be considered by ya'll. One other thing, you know, this crime was eight years old. I say eight, seven and a half or eight years old. You know, Jimmy Burden never killed anybody else before or since. That shows that he isn't a man that goes around killing people. This shows one particular incident. You know, there's hope for him. Rehabilitation is a possibility. He isn't a constant mass murderer. If he killed four people in seventy-four and killed ten more people since then, I would, you know, I could agree with you for the death penalty or agree with Mr. Malone that the death penalty may be appropriate, but this happened eight years ago. He has killed no one since then.

You know the Army has the firing squad for treason and other things. I know several of you indicated that you had some military service. You know, they choose five or six men to shoot a man down when he's been sentenced to death, and they give everybody one blank. If there are five of them, they are four live rounds and one blank that they everybody, and I read where the reason they give that blank is because anybody's conscious ever comes back to bother them, they can always say well, I had the blank. I had the blank. Well, there isn't any blanks in this jury, folks. It's got to be unanimous. It's got to be unanimous. No one is going to be able to say twenty years from now, after Jimmy Burden is dead, well, I had the blank. That can't be said. It's got to be unanimous.

Some more murders that took place in our history and in the world that the death penalty wasn't imposed on, probably the most

horrible crime that has ever been committed in the world that we know of, the Crucifixion of Jesus Christ; nailed to the Cross with spikes, drug through the street, had to carry the Cross on his back. God did not impose the death penalty on those who killed His own son, and probably the most horrible murder there has ever been committed. The first murder ever committed that we know of in mankind; Cain killed Abel. God did not impose the death penalty on that. We all live in what I refer to as a Christian community here in Washington County. Most of the people in South Georgia, in the South, are regular members of a Church somewhere and believe in Christianity and believe in the teachings of Jesus Christ, and the concept of Christ's teachings was love and forgiveness; not death, but love and forgiveness. Throughout the New Testament, that is His teaching and His belief and what His disciples taught, love and forgiveness.

The Judge is going to charge you as soon as I sit down. I'd like for you to think of other crimes more horrible that have been committed where the death penalty was not imposed. God did not impose the death penalty for the murder of Jesus Christ, our Lord and Saviour. Richard Speck did not go to the electric chair. They have not killed Richard Speck. The State of Georgia did not seek to kill Wayne Williams. Charles Manson wasn't killed in the electric chair.

Death by electrocution is a horrible, horrible death. Quite frankly, it is very grotesque. In all this, you won't find a

sentence of death, but you'll return a verdict of death, and t
the Judge has no choice but to sentence him to death, and that
just like putting your hand on the switch, and this is going t
done by the testimony of a man who received immunity in this c
His credibility was that he had to be held in jail under a fift
thousand dollar bond to make sure that he was here to testify.
You know, the Bible in Deuteronomy tells us, let me find that v
that to impose the death penalty, one than one witness is needed
more than one witness is needed. You need two or three witnesse
to impose the death penalty. Here it is, Deuteronomy, Chapter
Seventeen, Verse Six, at the mouth of two witnesses or three
witnesses, shall he that is worthy of death be put to death, but
the mouth of one witness, he shall not be put to death. The Bibl
tells you that this is not a death penalty case; that Jimmy Burde
should not be put to death. I ask that you follow your Christian
teachings of Jesus Christ and his Disciples. I ask that you foll
the Bible, the Verse that I just quoted. I ask that you consider
all the cases that have been tried in this country where the death
penalty was not imposed and compare them to this case. If those
people were not worthy of death, then Jimmy Burden should not die.
I ask you to remember that there are no blanks, absolutely no
blanks on this jury when you sentence him to death. If you return
a verdict of death, the Judge will sign a sentence of death, and
it's going to be on the testimony of one person and one person alon
who the Judge told you to scan his testimony with great care.

Ladies and gentlemen, if it could bring Louise Wynn back and her three children, I would stand right there and pull the switch myself for those children to have breath in them again. But, it ain't going to happen. We all know that. It ain't going to happen.

Now, as far as the deterrant goes that Mr. Malone was talking about, if, you know, if this were to deter Jimmy Burden from ever doing this again, he would have done it over the last eight years and he hasn't. Eight years have past since this happened.

Ladies and gentlemen, you have to live with your conscious, not the conscious of the community. It's always easy to say well, I would have done so and so or we would have done so and so; those that say that aren't on the front line. This is the front line. It's your decision. Please follow the verse that I read to you. Please remember that if you return a verdict recommending death that the Judge has no choice but to sentence him to death, and you're putting Jimmy Burden in the electric chair and it's pulling the switch on the testimony of Henry Lee Dixon.

Ladies and gentlemen, what I said to begin with, the evidence, I don't agree with your verdict, but I respect it. I ask that you return a sentence of life in prison on each count in this case, and recommend a life sentence. Now, you can find aggravating circumstances and the Judge will tell you that and still sentence him to life. You don't have to find aggravating circumstances and sentence him to death. You can not find aggravating circumstances and recommend life or you can find aggravating circumstances and

recommend life.

I think the other things that I have outlined demand this sentence by life imprisonment in each count. I ask and pray that ya'll return a sentence of life in each count.

Thank you very much.

BY THE COURT:

Ladies and gentlemen of the jury, I'm about to pass out to each of you the Charge, instructions, that I'm about to give you. I ask that you follow along with me when I read this Charge. Don't go to the next page and look to the second page when I'm on the first page. Just follow the form completely as I read it to you so that you won't be distracted with my reading of the Charge. Mr. Holmes, I'm going to give you a copy so that you can follow along as the foreman and then before you leave, you give me the copy back and I'll give you the original. Now, I'll say to the members of the Jury, Mr. Holmes is the foreman of the Jury. YOu may elect another foreman if you'd like to do so during the sentencing phase. If you will, please pass these out for me. I don't mean to suggest to you that he should not be the foreman. That's strictly within your discretion. Try not to anticipate what will be read. Just look at the first page and when we read the first page, we'll go to the second and down the line. I haven't furnished any to the alternates. I'ts not necessary.

Superior Courts, Middle Judicial Circuit, In the Superior

82 6210 14

82-6210

No. A-589

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JIMMY LEE BURDEN

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, by and through his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to Supreme Court of the State of Georgia without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court.

Petitioner's Affidavit in support of this motion is attached hereto as "Exhibit A."

Respectfully submitted,

Robert F. Muse #166868
STEIN, MITCHELL & MEZINES
1800 M Street, N.W.
Washington, D.C. 20036
(202) 737-7777

Attorney for Petitioner

No. 82- A-589

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JIMMY BURDEN, JR.

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, JIMMY BURDEN, JR., declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to relief.

1. Are you presently employed? Yes ___ No ✓

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

   August 1981
   $ 150.00 week

   b. If the answer is "no," state the date of last employment and theamount of salary and wages per month which you received.

   James E. Straley
   P. O. Box 55. Orlando, Fla. 32802

EXHIBIT A

2. Have you received within the last twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes___ No ✓
b. Rent payments, interest or dividends? Yes___ No ✓
c. Pensions, annuities or life insurance payments? Yes___ No ✓
d. Gifts or inheritances? Yes___ No ✓
e. Any other sources? Yes___ No ✓

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. _____

3. Do you own cash, or do you have money in checking or savings account?

Yes ___ No ✓ (Include any funds in prison accounts.)
If the answer is "yes," state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ___ No ✓
If the answer if "yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Jimmie Burden, Jr.

JIMMY BURDEN, JR.
Washington County Jail
Sandersville, Georgia 31082

RETAINER OF COUNSEL AGREEMENT

I, JIMMY LEE BURDEN, hereby retain Robert Muse, a member of the bar of the District of Columbia, and an attorney with the firm of Stein, Mitchell, and Mezines, to represent me in the filing of a Petition for Writ of Certiorari in the Supreme Court of the United States, and in any other legal proceedings, if necessary, relating to the sentences of death imposed on me in 1982, in the Superior Court of Washington County, Danielsville, Georgia, for the crimes of murder. I give him permission to associate with himself in this efforts such other attorneys as he in his best judgment sees fit.

It is understood between me and Robert Muse that the services which he and any other associated counsel render are free and without charge.

Jimmie Burden, Jr.

JIMMY LEE BURDEN
Washington County Jail
Sandersville, Georgia 31082

STATE OF GEORGIA
COUNTY OF WASHINGTON

The aforesaid Agreement of JIMMY LEE BURDEN was subscribed to and sworn to before me, this the 19 day of January, 1983.

Jewel Hardage

Notary Public

My Commission expires:

MY COMMISSION EXPIRES MARCH 26, 1984